

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

77-6078

77-6081

77-6083

UNITED STATES COURT OF APPEALS

for the

** PLEASE RETURN TO **
** RECORDS ROOM **

SECOND CIRCUIT

F. RAY MARSHALL, Secretary of Labor of the United States,

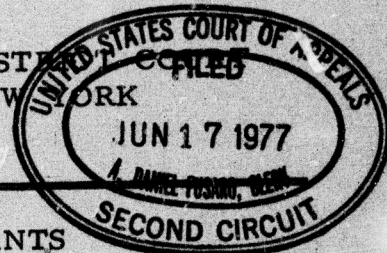
Plaintiff-Appellee,

-against-

GEORGE SNYDER, IRVING ROSENZWEIG, GENERAL TEAMSTERS
INDUSTRIAL EMPLOYEES LOCAL 806, 806 RECORD PROCESSORS,
INC., ANTHONY CALAGNA, CLARENCE CLARKE, JOSEPH GRIPPO,
JAMES ISOLA, BENJAMIN PETCOVE AND WILLIAM SNYDER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF ON BEHALF OF APPELLANTS
GEORGE SNYDER AND IRVING ROSENZWEIG

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X

F. RAY MARSHALL, Secretary of Labor :
of the United States, :

Plaintiff-Appellee, :

-against- :

Docket No. 77-6078

6081

6083

GEORGE SNYDER, IRVING ROSENZWEIG, :
GENERAL TEAMSTERS INDUSTRIAL :
EMPLOYEES LOCAL 806, 806 RECORD :
PROCESSORS, INC., ANTHONY CALAGNA, :
CLARENCE CLARKE, JOSEPH GRIPPO, :
JAMES ISOLA, BENJAMIN PETCOVE :
AND WILLIAM SNYDER, :

Defendants-Appellants. :

----- X

BRIEF ON BEHALF OF APPELLANTS
GEORGE SNYDER AND IRVING ROSENZWEIG

PRELIMINARY STATEMENT

This is a consolidated appeal in which all defendants join in seeking to overturn orders of the District Court which, inter alia, removed defendants George Snyder and Irving Rosenzweig, as Trustees of the Local 806 Health and Welfare Fund and also of the Local 806 Annuity Fund after a hearing on an application by the Secretary of Labor to punish all defendants for contempt and to appoint a Receiver because of alleged non-compliance with a consent order entered on February 4, 1977.

Inasmuch as appellants in Docket No. 77-6078 are addressing themselves to the legal questions involved, we

propose to develop the fact pattern insofar as it affects George Snyder and Irving Rosenzweig and their adherence to the consent order of February 4, 1977.

PROCEEDINGS IN DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

This action was instituted by the Secretary of Labor under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., to enjoin certain acts and practices of defendants, to remove certain defendants as trustees, and for the appointment of a receiver. The Secretary also moved for a preliminary injunction. On February 4, 1977, before the return day of the motion, the parties entered into a consent order enjoining certain acts of defendants and continuing certain other functions including salary payments to four of the named defendants.

By order to show cause dated April 8, 1977 plaintiff sought an order deeming defendants to be in contempt of the consent order, seeking a modification of the February 4, 1977 consent order, and for the appointment of a receiver of the benefit funds and the corporate defendant. A hearing was held in the District Court on April 21, 1977. The Court rendered a memorandum and order on April 28, 1977 enjoining any and all further payments to defendants, appointing a receiver for the benefit funds and defendant corporation and deferring decision

on the issue of contempt. A formal order removing the trustees of all the funds and granting the receiver extraordinary powers to manage the funds and the defendant corporation was entered on May 10, 1977.

On May 18, 1977 a notice of appeal from both orders was filed on behalf of defendants George Snyder and Irving Rosenzweig.

On May 19, 1977 these defendants moved in the District Court to stay the orders, which motion was denied the same day. All defendants joined in the motion in this Court by defendants in Docket No. 77-6078 to stay the orders of the District Court pending the determination of the appeal herein and for an expedited appeal.

Pursuant to the order of this Court made on June 2, 1977, the appeal herein was expedited and the motion in Docket No. 77-6078 was adjourned to the date of argument of the appeal.

FACTS

Defendant Irving Rosenzweig and George Snyder are the sole trustees of the Local 806 Health and Welfare Fund and are two of the trustees of the Local 806 Annuity Fund. Defendant George Snyder is a salaried official of the Health and Welfare Fund. No other trustee received any fee or salary. These defendants were sued in their individual capacities.

It is alleged in the complaint (par. 12) that defendants permitted the expenditure of large sums of money from welfare and pension plan assets as compensation to George Snyder (A-6).^{*} It is alleged (par. 13) that the former fund trustees expended pension plan assets for leasehold improvements in violation of their fiduciary responsibilities (A-7). It is alleged (par. 14) that defendants engaged in a "prohibited" transaction whereby welfare plan assets were borrowed by defendant union (A-7).

The motion for a preliminary injunction asked the Court to:

"(1) Enjoin the present trustee-defendants from any further payment to defendant George Snyder or defendant 806 from the assets of the Welfare Plan, the Pension Plan, the Annuity Plan, or from 806 Record Processors, Inc.; and

(2) Appoint an interim receiver for the plans to assume the duties of present trustee-defendants during the pendency of this action for their removal and until such time as new Trustees shall have been approved by the Court and shall have assumed their trusteeship."

On the entry of the consent order on February 4, 1977, plaintiff withdrew its motion for a preliminary injunction. The

^{*} The letters and numbers in parentheses refer to the pages of the appendix.

consent order stipulated that:

"The defendants, by consenting to this order, submit to the jurisdiction of the Court but do not admit to any of the allegations contained in the Complaint nor does this constitute a waiver of any defenses which may be available." (A-10).

It was then stated among other things that during the pendency of this action and until further order of the Court

"(1) that defendant trustees of the Local 806 Welfare Fund, Pension Fund, and Annuity Fund shall not make or permit to be made any direct or indirect payments for any purpose from the assets of the respective Funds of which they are trustees to defendant George Snyder, to any of the other individual defendants, to defendant Local 806, or for the benefit of any of said defendants;

(2) that defendant 806 Record Processors, Inc. shall not hereafter make or permit to be made any direct or indirect payments for any purpose from its assets to defendant George Snyder, to any of the other individual defendants, to defendant Local 806, or for the benefit of any said defendants; with the only exception that 806 Record Processors, Inc. may continue to make salary payments for services actually rendered to defendants Clarence Clarke, Anthony Calagna, James Isola, and William Snyder * * *." (A-11)

Pursuant to the consent order compensation payments to defendant George Snyder ceased and no further payments were

made or authorized to improve the leasehold at 275 Hollow Road. The order did not enjoin fee payments by the funds to 806 Record Processors, Inc. to provide recordkeeping and field services. And the order did permit salary payments to the four defendants employed by 806 Record Processors, Inc.

Pursuant to the consent order plaintiff's representatives periodically examined the books and records of the welfare, pension and annuity funds and the corporate defendant to determine compliance with the consent order.

In the course of plaintiff's examination of the payroll records of 806 Record Processors, Inc. it was noted that for the weeks of February 17, 1977 and March 3, 1977 defendant Isola received overpayments. Such overpayments represented a vacation allowance that was due that defendant. But nothing is said by plaintiff of the fact that for the weeks from March 14, 1977 to April 19, 1977 (6 weeks) this defendant received underpayments. Plaintiff also made note of the fact that defendant Clarke received an overpayment for the week of March 25, 1977 (A-11, A-291). But that was for the same reason-- vacation allowance (A-310).

Nevertheless, there is no testimony or evidence that defendant George Snyder or Irving Rosenzweig in their capacity as trustees of the Health and Welfare Fund authorized these payments.

At the hearing of April 21, 1977 plaintiff called three witnesses, Stanley Geller, an accountant for each of the entities, Constance Mavrosen, office manager for 806 Record Processors and Local 806 International Brotherhood of Teamsters, and Anne Craig, the medical claims processor employed by 806 Record Processors, Inc. These witnesses testified to matters of income and disbursements, clerical processing and bookkeeping, and medical claims processing as functions of 806 Record Processors, Inc. Witnesses Mavrosen and Craig testified concerning contact with field representatives employed by 806 Record Processors. Both witnesses indicated that field representatives were utilized to effect contact with beneficiaries in all aspects of benefit fund requirements as well as to seek to maintain promptness and accuracy of employer contributions. Geller testified that the welfare fund trustees made a single monthly payment to 806 Record Processors, Inc., for which it received all of the described services (A-18 - A-19).

Each of the salaried defendants named in the consent order testified, as did John Gonzales, an employee of 806 Record Processors, Inc. Their testimony essentially was that a substantial portion of their time each day was spent in matters involving the fringe benefits of the beneficiaries of the benefit funds as well as matters concerning contributions to

the benefit funds.

George Snyder was never served with a notice of deposition. Irving Rosenzweig was served by the delivery to counsel's office of a notice of deposition to which the only objection made was that the "notice was not served a reasonable time in advance of the date proposed for the taking of the deposition." The notice arrived at counsel's office at 2:05 p.m., Friday, April 1, 1977, and called for appearance on Wednesday, April 6, 1977, at 10:00 a.m., the day before defendant's counsel was to leave town and of which plaintiff's counsel had had notice for two weeks prior.

The only references to George Snyder made by the witnesses are to the fact that he was Secretary Treasurer of the Union (A-71 - A-72), for which he received no compensation (A-27), that he is a Trustee of the Health and Welfare Fund and the Annuity Fund (A-145 - A-146), that he has an office (A-131, A-156 - A-158), that he is the father of William Snyder (A-164), that he never was on the 806 Record Processors, Inc. payroll (A-214, A-220, A-245), that Devona drove him (A-249).

As to Irving Rosenzweig the only references are to the fact that he is a trustee of the Health and Welfare Fund and the Annuity Fund (A-145 - A-146), that he signs checks for 806 Record Processors, Inc. (A-252) and is a director of 806

Record Processors, Inc. (A-253). It must have been this last reference that resulted in finding number 15 of the Court below that Irving Rosenzweig was a director of 806 Record Processors, Inc. (A-300). But the Secretary of Labor has made no such claim. As a matter of fact, in his supporting memorandum filed in connection with the contempt proceeding, reference to Irving Rosenzweig being a director of 806 Record Processors, Inc. was crossed out in ink (p.5) and in fact Irving Rosenzweig acts in no such capacity.

POINT I

THE DISTRICT COURT HAD NO EVIDENCE
OR TESTIMONY TO INDICATE THAT THE
HEALTH AND WELFARE FUND DID NOT
RECEIVE THE SERVICES FOR WHICH IT
PAID.

Defendants George Snyder and Irving Rosenzweig, as trustees, made a single monthly payment to 806 Record Processors, Inc.; for which it provided all necessary services relative to the daily functions involving benefit payments to beneficiaries, recordkeeping for coverage, bookkeeping and efficient flow of contributions to the Health and Welfare Fund.

As trustees of the Health and Welfare Fund, although generally responsible for performance of the above described functions, they primarily were concerned with matters having to do with provisions of plan benefits, required contribution levels and investments.

There is no testimony or evidence to indicate that these defendants in their capacity as trustees were not providing the benefits and services required by the trust.

The District Court has clearly erred in its interpretation and application of the statute as it applies to "prohibited transactions". Accepting the conclusion that 806 Record Processors, Inc is a "party in interest," it does not therefore follow that it may not employ personnel who are also "parties in interest." Clearly the employment of personnel who are parties in interest comes within the exception set forth in 29 U.S.C. 1108(b) (2). The District Court did not make a finding that payments made to 806 Record Processors, Inc. by the Health and Welfare Fund constituted "prohibited transactions." In fact, plaintiff's counsel in a vague manner indicated disagreement with the Court on the issue of what constituted "prohibited transactions" (A-201 - A-202).

The record is barren of any evidence or testimony that the acts or policies of the trustees have rendered the Health and Welfare Fund unable to meet its commitments to its beneficiaries.

The appointment of a receiver and the suspension of the trustees was not warranted by the evidence.

Ordinarily the payment of compensation for services is not a "prohibited transaction" and plaintiff in the consent order agreed that payments in stipulated amounts for services rendered were not prohibited.

POINT II

THE DISTRICT COURT DID NOT
HAVE JURISDICTION TO APPOINT
A RECEIVER OF THE HEALTH AND
WELFARE FUND ASSETS.

The complaint herein, as noted by the District Court, focuses upon three transactions by certain of the individual defendants (A-315). Plaintiff seeks recovery of the sums involved, dissolution of the corporate defendant, removal of the trustees and appointment of a receiver.

Plaintiff does not allege nor is there evidence that the funds are in a precarious financial position as a result of poor management or not carrying out their function to provide benefits.

As a matter of fact, in the consent order, plaintiff has clearly agreed that the Health and Welfare Fund continue to receive contributions and pay benefits to its beneficiaries and has clearly agreed that the beneficiaries and the fund continue to receive the clerical and field services provided by 806 Record Processors, Inc.--in other words that the fund continue to operate normally. And plaintiff has not sued defendants George Snyder and Irving Rosenzweig in their capacity as trustees nor has he impleaded either the Health and Welfare Fund or the Annuity Fund as a separate entity.

If plaintiff is ultimately successful in his action, no receiver need be appointed, for defendants George Snyder

and Irving Rosenzweig would be removed as trustees, a money judgment would be entered regarding compensation to George Snyder and a money judgment would be entered against the union to recover the "loan."

The consent order, in enjoining further compensation to defendant George Snyder and enjoining any loans directly or indirectly between the Health and Welfare Fund and the union, provides sufficient temporary protection until the merits of the action can be determined.

Therefore, since there is an adequate remedy at law available to plaintiff if successful, and since there is sufficient protection until a final determination is made, the appointment of a receiver, being a drastic remedy, was clearly improper.

CONCLUSION

The orders of the District Court dated April 28, 1977 and May 10, 1977 should be vacated and annulled and the consent order of February 4, 1977 should be reinstated.

Respectfully submitted,

MURPHY & MAVIGLIA
Attorneys for Defendants-
Appellants George Snyder
and Irving Rosenzweig

CHARLES F. MURPHY
of counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 62-20 60th Rd.
MASPETH, New York City.

That on the 17th day of JUNE, 1977,
deponent personally served the within BRIEF ON BEHALF OF APPELLANTS
GEORGE SNYDER AND IRVING ROSENZWEIG
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

SHEA GOULD CLIMENKO & CASEY
Attorneys for Appellants, Calagna, Clarke,
Grippe, Isola, Petcove and William Snyder
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New York, N. Y. 10007

JITHENDER RAO
Attorney for Appellee
Office of Regional Solicitor of Labor
Room 3555, 1515 Broadway
New York, N. Y.

Robert La Grassa

Sworn to before me this

17th day of JUNE, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Murray H. Berman, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 311 W 97th St
NY NY 10025.

That on the 17th day of JUNE, 1977.,
deponent personally served the within BRIEF ON BEHALF OF APPELLANTS
GEORGE SNYDER AND IRVING ROSENZWEIG
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

MARK LEMLE AMSTERDAM
RUBIN, HANLEY & AMSTERDAM
Attorneys for Appellants, Local 806 &
806 Record Processors, Inc.
299 Broadway
New York, N. Y. 10007

Murray H Berman

Sworn to before me this

17th day of JUNE, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

